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Supreme Court of the United States

October Term 1939

No. 500

STATE OF MINNESOTA,

Petitioner,

vs.

NATIONAL TEA COMPANY AND ALLIED STORES CORPORATION (Formerly Hahn Department Stores, Incorporated).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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STATEMENT.

This matter arises on the petition of the State of Minnesota for a writ of certiorari to the Supreme Court of the State of Minnesota to review a decision of that court holding certain sections of Chapter 213 of the Session Laws of the State of Minnesota of 1933, as amended by Chapter 16 of the Extra Session Laws of 1933-34, to be invalid because in conflict with Section 1 of Article 9 of the Con-

stitution of the State of Minnesota and also Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decision below is reported at 286 N. W. 360, and appears in the record at pages 904 to 912.

SUMMARY OF ARGUMENT.

The petition for certiorari in this case fails to enumerate in its statement of "reasons relied on for allowance of the writ" (pages 10-19 of the brief) any of the usual reasons sufficient for exercise of this court's discretionary power to grant the writ (see Rule 38, Paragraphs 2 and 5).

However, what the petitioner urges elsewhere in its brief—and what is in fact the *only* reason which it can urge at all for the granting of the writ—is presence of a substantial Federal question. This question is whether or not the State tax involved violates the "equal protection" clause of the Fourteenth Amendment of the Federal Constitution.

Respondents contest this ground. Their position is that (1) the decision below proceeded upon an independent State ground broad enough to maintain the judgment (namely, that it violated the "uniformity" clause of the State Constitution); and (2) the State court decided a question which, in so far as it is a Federal question, was decided below exactly in accordance with applicable decisions of this court.

ARGUMENT.

I. THE DECISION BELOW WAS BASED UPON AN INDEPENDENT GROUND OF STATE LAW.

The State concedes (p. 22) that if the judgment of the State Court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, no federal question is presented and this Court will not take jurisdiction. In fact it could not be argued otherwise. *Lynch v. New York*, 293 U. S. 52. The State then argues that in the case at bar the State matter decided was not independent.

It clearly appears that the decision of the Minnesota Supreme Court in the consolidated cases at bar was based upon an independent ground of state law which had been present in the cases from the outset and which was urged at every stage of the proceedings.

The complaint in each case contained the following allegations (R. p. 6, ff. 17-18, and p. 93, ff. 277-279):

"The said Act, as plaintiff alleges, is null and void on its face, and especially by reason of the facts hereinafter alleged, because

(1) It is in violation of Article 1, Section 2, of the Constitution of the State of Minnesota, in respect of the provision thereof that 'no member of this State shall be * * * deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers';

(2) It is in violation of Article 1, Section 7, of the Constitution of said State, in respect of the provision thereof that 'no person shall be deprived of life, liberty, or property without due process of law';

(3) It is in violation of Article 4, Section 34, of the Constitution of said State, in respect of the provision thereof that all general laws 'shall be uniform in their operation throughout the State';

(4) It is in violation of Article 9, Section 1, of the Constitution of said State, in respect of the provision thereof that 'taxes shall be uniform upon the same class of subjects';"

These allegations were denied by the State (R. p. 49, f. 146, and p. 123, f. 369).

The trial court, in its Findings of Fact in each case, found (R. p. 79, f. 236 and p. 146, f. 438) that "the imposition of the tax, so far as measured by Section 2(b) of the Act is in violation of Article 9, Section 1, of the Constitution of the State of Minnesota * * * and is therefore void". In its Conclusions of Law in each case the trial court found (R. pp. 84-85, ff. 252-253 and p. 151, f. 453) that "the gross sales tax feature of said act, that is, the provisions imposing tax as defined and measured by Section 2(b), is unconstitutional as being in violation of Article 9, Section 1, of the Constitution of the State of Minnesota * * * and is therefore void".

The state Supreme Court, in its opinion, stated at the outset that the question at issue was "not whether chain store owners may, for taxation purposes, be validly classified separately from single store owners, but whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating the constitutional requirement of *uniformity*". (Italics supplied.) The provision in the Minnesota Constitution is that "taxes shall be uniform upon the same class of subjects"; the provision in the federal Constitution is, of course, phrased in terms

of equal protection. In other words, the Court stated the problem in terms of the state constitution, not the federal.

After briefly reviewing the facts, the Court then quoted the Finding of Fact set forth above, quoted the applicable provisions of the federal and state constitutions, and cited *Reed v. Bjornson*, 191 Minn. 254, 253 N. W. 402. In its petition for certiorari the State relies heavily on the citation of the *Reed* case to show that the state Court was not exercising an independent judgment in construing and applying the provisions of the Minnesota Constitution; but examination of the *Reed* case itself will show that such was not the Court's view.

In the *Reed* case the Minnesota Court began by saying:

> "We are concerned only with the sound interpretation of the constitution of this state and of the United States. If we err in our construction of the latter, our views may be corrected by the Supreme Court. Our interpretation of our own constitution is of course final."

The Court then reviewed the history of the provision in the Minnesota Constitution requiring uniformity and went on to say (p. 260):

> "It will help us in the solution of the question here presented if we determine whether there is a distinction between our own constitutional provision requiring uniformity and the requirement of equal protection of the laws contained in the federal constitution. Certain legislative classifications have been questioned under the fourteenth amendment, and the judicial results may be helpful to us here if the two provisions are in effect the same or similar when applied to taxation. The respondent, recognizing the importance of this point, strenuously contends that the uniformity clause

is the more restrictive. Just how much more he does not assume to say, except that he asserts that it is sufficiently so to prohibit the classifications in the act at bar. In Lake Superior C. I. Mines v. Lord, 271 U. S. 577, 581, 46 S. Ct. 627, 628, 70 L. ed. 1093, 1101, a tax case, the Supreme Court, construing our constitutional requirement of uniformity, said that 'it seems to us sufficiently plain that this provision goes no further than the fourteenth amendment. Consequently, if the legislation under review does not offend that amendment there is no conflict with the state constitution.' Of course the proper construction to be given our constitution is not a federal question but one upon which our own views are controlling. Nevertheless we regard the construction thus placed upon it by that high court as entitled to great weight.

* * * * *

"The inference seems apparent that equality of protection includes uniformity of application to the subject of taxation and that our uniformity clause is not more restrictive than the equal protection clause of the fourteenth amendment.'

* * * * *

"If classifications logically similar to those before us have been justified under the fourteenth amendment, those holdings throw light on whether or not the classifications under our income tax act violate our uniformity clause."

So far from indicating that the Minnesota Supreme Court abdicates its independent judgment in favor of this Court in these cases involving the equal protection and uniformity clauses of the two constitutions, the *Reed* case shows that the Minnesota Court exercises an independent judgment even where this Court had previously construed the uniformity provision of the Minnesota Constitution.

The reference to the *Reed* case in the decision below obviously means that the tests to be applied under the uniformity clause of the Minnesota Constitution and under the Fourteenth Amendment of the United States Constitution are substantially the same. But the Minnesota Court has never indicated that it considers the decisions of this Court controlling in construing the provisions of its own fundamental law. It has not, and it cannot, abdicate its own function of declaring that law. Article VI, Section 1, Constitution of Minnesota; Reed v. Bjornson, supra; Erie v. Tompkins, 304 U. S. 64, 78.

In its decision here, the Minnesota Court indicated clearly that one of the alternative and independent grounds of its holding was the provisions of the Minnesota Constitution. The Court stated the general rule as to the requirement of uniformity under the state constitution and then cited three cases, each of which had held a state statute invalid because of violation of the state constitution alone. In the first of these, *State v. Minnesota Farmers Mutual Ins. Co.*, 145 Minn. 231, 176 N. W. 756, it was held that a tax on gross premiums of insurance companies violated the uniformity clause of the Minnesota Constitution. In the second case, *State ex rel. Mudeking v. Parr*, 109 Minn. 147, 123 N. W. 408, a statute licensing and taxing bankers and peddlers was held to violate the uniformity clause of the Minnesota Constitution. In *In re Improvement of Third Street, St. Paul*, 185 Minn. 170, 240 N. W. 355, a system of assessment was held to violate the uniformity clause of the Minnesota Constitution.

In none of these decisions was the federal constitution cited or involved. All went off solely on grounds of state law. The decisions were relied upon as controlling by the

Court in the case at bar, and it was only after considering them, and with the phrase "so much for our own cases", that the Court passed on to consider the provisions of the federal constitution. Obviously the fact that the gross sales tax violated Article 9, Section 1 of the Minnesota Constitution was a separate and independent ground of decision here, in itself broad enough to maintain the judgment. This alone is ground enough for denial of certiorari.

The State relies upon *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, but in that case this Court pointed out that the remittitur of the lower court certified that the federal constitutional question was presented and *necessarily* passed on. It seems clear that by the use of this word the Court meant to point out that the State Court did not place its ultimate decision upon both state and federal constitutions, but that that court, passing the state ground of decision "necessarily" based its decision upon the repugnancy of the state statute to the federal constitution. An examination of the opinion of the Court of Appeals of New York, and of the remittitur sufficiently shows that the State Court did not rest its final conclusion and decision upon the repugnancy of the state statute to both state and federal constitutions, but, ignoring state ground, rested its decision solely upon the invalidity of the statute under the Fourteenth Amendment to the federal constitution.

The New York Court said (200 N. Y. 799, at 800, 801):

> "We do not see wherein this act differs materially from the act of Congress ruled upon in Adkins v. Children's Hospital of District of Columbia, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, wherein it was held that the Minimum Wage Act of September 19, 1918, c. 174 (40 U. S. Stat. 960), was

an unconstitutional interference with liberty of contract. The interpretation of the Federal Constitution by the United States Supreme Court is binding upon us; we are in duty bound to follow its decisions unless they are inapplicable. We find no material difference between the act of Congress and this act of the New York State Legislature.

* * * * * *

"The distinctions between this case and the Adkins Case are differences in details, methods, and time; the exercise of legislative power to fix wages in any employment is the same. We should follow the law as given, and not speculate as to the changes which have come or are supposed to have come to economic conditions in the last decade which may move the Supreme Court to a further consideration of its ruling.

* * * * * *

"The order below should be reversed, the writ sustained, and the prisoner discharged, as chapter 584 of the Laws of 1933, under which he is held, is unconstitutional according to Adkins v. Children's Hospital of District of Columbia, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238."

Unlike the decision of the Minnesota Court below, the New York Court cited no state decisions in support of its ruling, and made no general statement of the effect of the state constitutional provision. Obviously the *Morehead* case was decided by the state court upon federal grounds only, and for that reason the jurisdiction of this Court in that case may be sustained under the rule of *Grayson v. Harris*, 267 U. S. 352. (As to the effect of the remittitur, see *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 and *Honeyman v. Hanan*, 300 U. S. 14). A different situation from the *Morehead* case is presented here.

If in this case the State court had considered merely the federal question, and even if this court should reconsider its earlier decisions on that question and should come to an opposite conclusion, the most that this court could do would be to remand the case for determination by the state court of the controlling point arising under its own law. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95. Since the lower court has already determined the point of state law against the validity of the statute, there would be nothing for this court to do in any event but to affirm the judgment. The state ground of decision was independent and controlling, review by this court would be merely moot, and no proper occasion for certiorari is presented.

II. THE IDENTICAL FEDERAL QUESTION HAS ALREADY BEEN SETTLED BY PREVIOUS DECISIONS OF THIS COURT.

Even were the decision below not based upon an independent ground of state law, the identical federal question involved here has already been settled by previous decisions of this Court.

The leading case on the question of the validity of a graduated gross sales tax is *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, involving the constitutionality of a Kentucky statute. Under that act, the minimum and maximum rates were identical with those of the Minnesota Act. Generally the rates in the lower brackets were somewhat higher than the Minnesota rates and the rates in the higher brackets somewhat lower. The two acts are identical in all features bearing upon their constitutionality. The Kentucky Act was held void for violation of

the equal protection clause of the Federal Constitution. The classification of merchants on the basis of volume of gross sales for the imposition of a graduated gross sales tax was held to be arbitrary, unequal, and discriminatory. Considered to be decisive against the validity of the Act was the absence of any reasonable or constant relation between volume of gross sales and rate or ratio of net profit. It was not in that case, and is not in the present case, a question of whether aggregate profits increase with volume of sales. The question is whether there is an increase in *ratio* of profit with an increase in volume of sales in correspondence with the graduation upward of the rates. The facts considered by the Court to be of controlling importance in the Kentucky case include the following, as stated by the Court (pp. 555-559):

(1) "Sales made by merchants taxed under any of the brackets of the act are made in competition with like sales of the same character of merchandise by those who are taxed under other brackets."

(2) "As a general proposition, increased volume of sales results in increased profits and increased ability to pay the tax * * *," but "the ratio of increase * * * differs in different lines of activity. * * *"

(3) "The rate of profit from retail sales generally varies with the character of the goods sold."

(4) "The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized and the amount of the profit. As a general proposition those merchants doing the largest amount of trade are enabled to secure the highest type of management."

(5) "And the excise is laid in respect of the same activity of each of them—the making of a sale. Although no difference is suggested, so far as concerns the transaction which is the occasion of the tax, be-

tween the taxpayer's first sale of the year and his thousandth, different rates may apply to them. The statute operates to take as the tax a percentage of each dollar due or paid upon every sale, but increases the percentage if the sale which is the occasion of the tax succeeds the consummation of other sales of a specified aggregate amount."

(6) "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume."

(7) "The trial court made no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance."

The conclusion from this analysis of the law and facts was (p. 557):

"Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned."

Every vice in the law and every fact in the case which condemned the Kentucky Act is present in the case at bar, and likewise condemns the Minnesota Act. The complete analogy between the facts of the two cases may be seen by comparing the comments of the Court in the Kentucky case above quoted with the findings of the Court below in

the case at bar, which include the following (R. pp. 76-79, ff. 228-235, and pp. 145-147, ff. 434-437):

"14.

"The stores of the plaintiff are distributed generally throughout the state, and are operated in both large and small cities and towns. Generally speaking, the stores are operated in direct competition with stores in the same line of business operated by other chains, by the members of voluntary chains, and by owners of single stores. Commonly in plaintiff's store location are found competing stores involving all three types of operation. The competing chains are of various sizes as measured either by number of stores or aggregate gross sales. The result has been that these competitors have been subject to and have paid taxes under the act at various rates both as to the specific and gross sales tax features. Thus an analysis of the taxes paid by the plaintiff and twenty-two of its principal chain competitors for the year 1934 shows that the gross sales tax average or composite rates paid by the competitors varied from .05 per cent to .85 per cent as compared with the rate of .87 per cent paid by plaintiff. The maximum rates varied from 1/20 of one per cent to one per cent, the latter being the maximum rate paid by plaintiff. * * *

"15.

"As in the case of plaintiff and its competitors, it is true generally that sales made by persons taxed under any brackets of the Act are made in competition with like sales of the same character of merchandise made by persons who are taxed under other brackets of the act.

"The gross sales tax is laid as an excise upon individual sales. As each sale is made liability for tax

upon that sale arises. Different sales, however, take different rates, though they be of identical articles or merchandise and be made in identical manner. The rate upon any sale depends upon the number and size of sales already made in the current year. The Act therefore taxes different persons at different rates for the privilege of doing the same act, and taxes the same person at different rates for the exercise of the same privilege at different times, depending upon the number of times it has previously been exercised in a given year.

"16.

"In Minnesota, as elsewhere, there is no constant or uniform relation between volume of gross sales and amount or rate of net profit. There are wide variations in the profit margins as between different kinds of business and different kinds of merchandise; also wide differences in the rate of net profit made by different concerns in the same line of business for any given period; also wide variations in the rate of profit made by the same concern or concerns in any given line of business from year to year and from time to time. A great many factors enter into the result, among which may be mentioned efficiency of management, form of organizations, expenses of operation, competitive conditions, character of community, type of patrons, proportion of high and low profit margin goods sold, and trend of commodity prices."

From these findings there inevitably followed the Court's conclusion as follows (R. p. 79, ff. 235-6, p. 146, f. 438):

"17.

"In the light of the foregoing findings the gross sales tax is arbitrary, unreasonable, unequal, and dis-

criminatory, and the classification of chain store systems or concerns according to the volume of their gross sales (resulting from the graduation of the gross sales tax rates) is without relation to the purpose of the Act and without relation to the value of the privilege for which the tax is enacted, and the imposition of the tax, so far as measured by Section 2(b) of the Act is in violation of Article 9, Section 1, of the Constitution of the State of Minnesota, and in violation of Article XIV, section 1, of the Amendments to the Constitution of the United States, and is therefore void."

and the Court's conclusion of law (R. pp. 84-85, f. 252-253 and p. 151, f. 453):

"15.

"The gross sales tax feature of said act, that is, the provisions imposing tax as defined and measured by Section 2(b), is unconstitutional as being in violation of Article 9, Section 1, of the Constitution of the State of Minnesota, and in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and is therefore void."

These findings were summarized and quoted in part by the Minnesota State Supreme Court and were relied upon by it in reaching its decision.

The State in its brief (pp. 15, 16, 27, 28) suggests as a point of distinction that the Kentucky tax was not a chain store tax; in other words, that the Act applied to all stores whereas the Minnesota Act excludes one store and is therefore a Chain Store Act. The supposed distinction is irrelevant and invalid. The Kentucky Act was held unconstitutional not because it applied to single stores as well as

to chain stores or because it failed to classify chain stores separately from single stores. It was held void because it classified retail merchants for a graduated imposition by the use of gross sales as the gradient. The vice in the Act would be present whether the tax was on single stores, on chain stores, or on both. The discrimination for which the tax was condemned was not in any way dependent upon the inclusion of single stores, and would have been equally fatal to its validity regardless of the class or classes of stores to which it applied. It will not, we think, be said that there is any closer relationship between gross sales and rate of net profit in the case of chain stores than in the case of single stores. If not, how could the elimination of single stores improve the Act from a constitutional standpoint? With respect to those remaining within the scope of the Act, it would be open to the same charge of discrimination and inequality that it was before and would be equally indefensible. Chain store owners as between themselves are as much entitled to equal protection of the laws, whether the discriminatory law complained of does or does not also apply to the owners of single stores. Otherwise stated, the discrimination under the Kentucky Act was not one that applied in any sense as *between* single store retailers as a class and chain store retailers as a class. It applied equally to both. It applied just as clearly between the owner of two stores and the owner of three stores; or between the owner of three stores and the owner of three hundred stores, as it did between the owner of one store and the owner of any other number of stores. The discrimination was between retailers having different volumes of gross sales subjecting them to different rates in a graduated scale. Equal protection of the laws and uni-

formity of taxes upon the same class of subjects require not only that the primary classification shall be justified by differences germane to the purpose of the law, but also that all those within a given primary class shall be accorded like treatment.

The Iowa Act involved in *Great Atlantic & Pacific Tea Co. v. Valentine*, 12 F. Supp. 760, 299 U. S. 32, was substantially a duplicate of the Minnesota Act. It was strictly a Chain Store Act, applying only to retailers operating two or more stores. Section 4(a) imposed a specific tax graduated precisely as in the Minnesota Act. Section 4(b) imposed a gross sales tax in flat sums but graduated according to volume of gross sales, called gross receipts. The lowest rate was $25.00 when the gross receipts were not in excess of fifty thousand ($50,000) dollars. The amounts were then stepped up with each additional $10,000 of gross receipts until at the top there was $1,000 for each additional $10,000 in excess of nine million ($9,000,000) dollars.

A three-judge Federal District Court held the specific tax valid but struck down the gross sales tax on the authority of the decision of the United States Supreme Court in the Kentucky case. The gist of the opinion on the gross sales features of the tax appears from the following language of the Court (p. 765):

> "While the Iowa chain store tax-law here under consideration is in some particulars different from the Kentucky statute under consideration by the Supreme Court in the Stewart Case, supra, we are of the opinion that as we find and have found that there are similar controlling facts in the two cases, that this case is governed by the pronouncements in the Stewart Case.
>
> "The classifications are different, as in the case at bar the tax under consideration is only imposed upon

retail stores having more than one separate unit, while under the Kentucky statute the classification included all retail stores. Under the Kentucky act the maximum exaction upon gross sales of the retailer was limited to 1 per cent, while here the maximum exaction which, under the act is applicable to some of the litigants in these cases amounts to approximately 5 per cent on the gross receipts from sales. Another difference is that the Kentucky statute provided for a percentage tax on each graduated classification of gross sales, while under the Iowa law the tax is a flat amount on each such graduated classification.

"In these particulars the cases are different, but we are unable to say that such differences permit the escape of a similar condemnation as being arbitrarily and discriminatory under the pronouncements in the Stewart Case. * * * The limitation in the classification to the taxation of chain stores only could not change the nature of the tax, and this would be true, giving consideration to the distinctive business species of the chain stores and all economic and welfare questions which are brought about by their advantages in making sales. Such questions might well bear on the propriety of the classification, but not on what constitutes the form or nature of a tax."

This decision was affirmed by the Supreme Court of the United States in a per curiam opinion upon the authority of its decision in the Kentucky case. *Valentine et al. v. Great Atlantic & Pacific Tea Co.*, 299 U. S. 32.

There is no distinction between the case at bar and the *Stewart* and *Valentine* cases. The State impliedly recognizes this in asking this Court to reconsider these prior decisions.

In *Ed. Schuster & Co. v. Henry; Wadhams Oil Co. v. Same*, 218 Wis. 506, 261 N. W. 20, there was involved the

validity of a Wisconsin Act imposing what was strictly a chain store tax. It applied only to operators of two or more retail stores. The tax was upon gross sales (called gross income), and the rates were graduated from six-twentieths of one per cent upon gross sales of $100,000 or less to thirteen-twentieths of one per cent on all gross sales in excess of $5,000,000. In the higher brackets the tax was only about one-half as great as that imposed under the Minnesota Act.

In the trial Court demurrers to plaintiffs' complaints were sustained. The orders sustaining the demurrers were reversed on appeal to the Supreme Court of Wisconsin, which followed the decision of the United States Supreme Court in the Kentucky case and held the law to be in violation of the Federal Constitution. That the factual basis for the decision corresponds with that in the case at bar is plainly indicated by the several excerpts from the opinion next below quoted (p. 21):

> "However, it is unnecessary to state those facts here, because the decision in Stewart Dry Goods Co. v. Lewis, 55 S. Ct. 525, * * * fully sustains the fundamental proposition contended for by the plaintiffs, that section 76.75, Stats., in imposing a graduated tax on gross incomes, is so arbitrary, unreasonable, and discriminatory that it denies to plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment, U. S. Const."

In reference to certain allegations of the complaint and the conclusion to be drawn therefrom, the Wisconsin Court observed (p. 24):

> "Those statistics all demonstrate that there is no constant or reasonable relation between gross income and net income or between the gross income and the

> size, in so far as the number of stores is concerned, of an integrated chain, or between its gross income and its ability to pay a tax imposed at rates increased progressively for the higher brackets of its gross income, and that consequently there is no reasonable relation between such graduations in the rate of taxation and the actual relative value to the parties taxed of the privilege which is enjoyed by each of them as an operator of a chain store, and which constitutes the subject that is taxed. * * *"

An application by the State of Wisconsin to this Court for a writ of certiorari was denied. *Henry v. Wadhams Oil Co.*, 296 U. S. 625. It is a reasonable inference that the Wisconsin case was deemed to be governed by the Kentucky case.

There have been similar holdings in *Great Atlantic & Pacific Tea Co. v. Harvey*, 107 Vt. 215, 177 Atl. 423 and *Lane Drug Stores v. Lee*, 11 F. Supp. 672 (D. C. N. D. Fla.).

The State urges the cases of *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, and *Pacific American Fisheries v. Alaska*, 269 U. S. 269, in support of its request that this Court reconsider its holdings in the *Stewart* and *Valentine* cases.

Obviously the State cannot complain (see State's brief, p. 10) to this Court that the Minnesota Supreme Court failed to uphold the statute in question as an exercise of the police power. The failure of the State Court to pass upon the point, or its determination that the statute was not an exercise of the police power or the failure of the plaintiffs to sustain the burden of proof on this point (see State's brief, p. 14), would involve no federal question.

Neither the *Pacific American Fisheries* case nor the *Grosjean* case are in conflict with the *Valentine* and *Stewart* cases. The latter two decisions involved taxes upon gross sales, the former, specific taxes upon number of stores or number of fish packed, and this Court was careful to emphasize the distinction. The only question in the *Grosjean* case was whether the State could take into consideration the fact that the taxpayer owned stores outside the State, and that question was resolved in favor of the State. The Petitioner has cited no case showing any duty in the State Supreme Court to construe the Act as being an exercise of the police power of the State. In fact the trial Court refused so to construe the Act (R. pp. 69, 137, ff. 204, 410) and the Supreme Court affirmed the trial court's decision without amending the findings or conclusions of law. Under such circumstances, this Court will not question the interpretation of the Minnesota statute which has been placed upon it by the courts of the State. *Article VI, Section 1, Constitution of Minnesota; Reed v. Bjorvson*, 191 Minn. 254, 257, 253 N. W. 102, *supra; Erie v. Tompkins*, 304 U. S. 64, 78.

The *Grosjean* case arose on appeal from a three-judge federal court. The Louisiana courts had never passed on the statute in question and this Court was in duty bound to adopt any construction on which the statute could be upheld. *Thompson v. Consolidated Gas Co.*, 300 U. S. 55. That is not the case where the State Court has first had an opportunity to pass on the construction and validity of its own statute and has made an adverse determination. Had the Minnesota court felt that this statute was intended as an exercise of the police power, or that, so intended, it was a valid exercise of the police power under the uniformity clause of the state constitution, it could have

so declared. Obviously the Court thought that the statute was not an exercise of the police power and that it could not be supported under either state or federal constitutions.

CONCLUSION.

The Minnesota Court held that the sections of the Act in question were invalid under the uniformity clause of the state constitution. The point had been relied upon by the trial court. The Minnesota Supreme Court stated in general terms the effect of the state constitution and cited, in support of its ruling, Minnesota cases which had gone off solely on ground of state law. It is clear that there was an independent ground of state law, adequate to maintain the judgment. Accordingly this Court will not take jurisdiction.

Even were the federal question controlling, the decision of the Minnesota Court was in harmony with previous decisions of this Court. There is no occasion for this Court to reconsider its former rulings. It is respectfully submitted that the petition for certiorari should be denied.

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